No. 97-174

In The

Supreme Court of the United States

October Term, 1997

CASS COUNTY, MINNESOTA; SHARON K. ANDERSON, in her official capacity as Cass County Auditor; MARGE L. DANIELS, in her official capacity as Cass County Treasurer; STEVE KUHA, in his official capacity as Cass County Assessor; JAMES DEMGEN, in his official capacity as Cass County Commissioner; GLEN WITHAM, in his official capacity as Cass County Commissioner; ERWIN OSTLUND, in his official capacity as Cass County Commissioner; VIRGIL FOSTER, in his official capacity as Cass County Commissioner,

Petitioners,

vs.

LEECH LAKE BAND OF CHIPPEWA INDIANS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Under the decisions of this Court in *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992), and *Goudy v. Meath*, 203 U.S. 146 (1906), is alienable land patented in fee by the federal government, and subsequently reacquired in fee by an Indian band, subject to state and local government taxation if it remains freely alienable, irrespective of the statute or treaty under which it was originally conveyed?

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The opinion of the court of appeals (Pet. App. 1-29)[1] is reported at 108 F.3d 820. The opinion of the district court (Pet. App. 30-49) is reported at 908 F. Supp. 689.

JURISDICTION

The court of appeals entered its judgment on March 6, 1997, and Petitioners' petition for rehearing was denied by order dated April 9, 1997. The petition for a writ of certiorari was filed on July 8, 1997, and was granted on October 31, 1997. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1) (1996).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Nelson Act of 1889, 25 Stat. 642, §§ 3, 4, 5 and 6 (Resp. App. A-1-A-8);[2] the General Allotment Act of 1887, 24 Stat. 388, §§ 5 and 6 (Resp. App. A-9-A-15); the Burke Act of 1906, 34 Stat. 182 (Resp. App. A-16-A-17); the Homestead Act of 1862, 12 Stat. 392, as amended by the Act of 1891, 26 Stat. 1095 (Resp. App. A18-A-36).

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[1] "Pet. App. ___" designates appendix pages to the Petition for a Writ of Certiorari.

[2] "Resp. App. ___" designates appendix pages to Respondent's Brief in Opposition to Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Respondent Leech Lake Band of Chippewa Indians ("the Band") is a federally recognized Indian tribe, with its Reservation in Cass County, Minnesota, having been established in accordance with the treaty of February 22, 1855, 10 Stat. 1165. Pet. App. 53.

In the late 19th century the federal government instituted a policy of allotting lands to individual Indians. The objectives of this policy were: "to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 254 (1992).

In accordance with this federal policy, Congress, in 1889, passed the Nelson Act. Act of January 14, 1889, ch. 24, 25 Stat. 642. Under the Nelson Act the United States conveyed land located in Leech Lake and other Chippewa Indian reservations in Minnesota to Indians and non-Indians in three separate ways: (1) allotments to individual Indians pursuant to section 3 of the Nelson Act "in conformity with" the General Allotment Act of 1887 ("the GAA"), ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. § 331 *et seq.* (1996)); (2) sales to non-Indians under the "pine land" sale provisions of sections 4 and 5 of the Nelson Act; and (3) conveyances to non-Indians pursuant to the Homestead Act, as authorized under section 6 of the Nelson Act.

Under the GAA (the allotment provisions of which were incorporated into the Nelson Act) the United States government was authorized to allot, and ultimately patent in fee, lands to individual Indians. Section 5 of the GAA provided that the allotted lands were subject to a

twenty-five-year trust period ("the trust period") and that those lands would be patented in fee to the allottees, becoming freely alienable by them, upon expiration of the trust period.[3] Section 6 of the GAA provided, *inter alia*, that the GAA allottees, upon patenting of their lands to them, would become subject to the civil and criminal jurisdiction of the state or territory in which they resided,[4] thereby furthering the goal of assimilation. *See Yakima*, 502 U.S. at 254.

In *In re Heff*, 197 U.S. 488 (1905), this Court held that section 6 of the GAA subjected allottees to plenary state

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[3] Section 5 of the GAA provided in part:

> [A]t the expiration of said [trust] period the United States will convey [the allotted lands] by patent to said Indian . . . in fee, discharged of said trust and free of all charge or encumbrance whatsoever. . . . And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the [trust period], such conveyance or contract shall absolutely be null and void. . . .

25 U.S.C. § 348 (1996); 24 Stat. 388, § 5; Pet. App. 59.

[4] Section 6 of the GAA, prior to the 1906 amendment, provided with respect to jurisdiction over the allottees:

> That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law.

25 U.S.C. § 349; 24 Stat. 388, § 6; Pet. App. 59.

jurisdiction prior to expiration of the trust period provided under section 5. In reaction to that decision, Congress enacted the Burke Act amendment to section 6, which provided that the allottees would not become subject to state civil and criminal jurisdiction until expiration of the trust period. *See Yakima*, 502 U.S. at 264. The Burke Act also contained a proviso permitting the Secretary of the Interior, under certain circumstances, to issue fee patents prior to expiration of the section 5 trust period.[5]

Finally, in 1934, with the enactment of the Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. § 461 *et seq.* (1996), the federal government's allotment program and policy of assimilation came to an end, and Congress returned to "the principles of tribal self-determination and self-governance." *Yakima*, 502 U.S. at 255.

Beginning with the year 1993, following this Court's decision in *Yakima*, Petitioners[6] ("Cass County" or "the County") assessed property taxes against certain land parcels owned in fee by the Band, which had been purchased from private owners. Pet. App. 55. The Band paid

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[5] The Burke Act proviso provided:

> That the Secretary of the Interior may in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, encumbrance, or taxation of said land shall be removed.

25 U.S.C. § 349 (1996).

[6] The Petitioners include Cass County, Minnesota, and eight county officials.

the assessed taxes under protest (Pet. App. 55) and then brought this action for declaratory, injunctive, and monetary relief against the County in the United States District Court for the District of Minnesota. The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331, 1362, 2201 and 2202; 25 U.S.C. § 177; and 42 U.S.C. § 1983. Pet. App. 52.

The issue in the district court case was whether the land parcels in question, which were originally patented in fee by the federal government under the Nelson Act and subsequently reacquired in fee by the Band, are subject to ad valorem taxation by the County. The parcels were patented under the three provisions of the Nelson Act described above: (1) allotted to individual Indians pursuant to section 3 of the Nelson Act "in conformity with" the GAA (thirteen parcels) (Pet. App. 61); (2) sold to non-Indians as pine lands pursuant to sections 4 and 5 of the Nelson Act (seven parcels) (Pet. App. 62); and (3) conveyed to non-Indians pursuant to the Homestead Act[7] under the authority found in section 6 of the Nelson Act (one parcel) (Pet. App. 62-3).

The case was heard by the district court on the Band's motion for summary judgment. The court determined that the matter was ripe for summary judgment and granted judgment to defendants, holding that all twenty-one parcels at issue were subject to taxation by Cass County, Pet. App. 31, 49. In arriving at its decision, the court relied on the decision of this Court in *Yakima*

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[7] The Homestead Act of 1862 (12 Stat. 352), as amended by the Act of 1891 (26 Stat. 1095).

which held that lands originally allotted to individual Indians under the GAA and subsequently reacquired in fee by the Yakima Nation or its members, are subject to taxation by Yakima County, Washington. Pet. App. 37-38. In holding that all of the parcels at issue are subject to taxation, the district court determined that *Yakima* stands for the proposition that alienable lands originally patented in fee by the federal government, which have subsequently been reacquired by an Indian tribe or its members, remain freely alienable and therefore subject to ad valorem taxation. Pet. App. 46. Specifically, the district court relied on *Yakima* for its determination that Congress signaled its consent to taxation of the allotted lands through section 5 of the GAA which rendered the allotted lands alienable and encumberable following expiration of the trust period. Pet. App. 36-37.

The court of appeals, in a two-to-one majority decision, affirmed in part and reversed in part the decision of the district court. The majority decision held that the thirteen parcels allotted under section 3 of the Nelson Act, which incorporated the allotment provisions of the GAA, were subject to taxation to the extent they had been patented in fee after enactment of the Burke Act; but that the seven parcels originally sold as pine lands (sections 4 and 5 of the Nelson Act) and the single parcel sold under the Homestead Act (as authorized by section 6 of the Nelson Act) were exempt from taxation. Pet. App. 22-23. The court set out three interrelated bases for its decision.

First, citing *Yakima*, 502 U.S. at 258, the majority stated that Cass County's position that the pine lands and homestead parcels are subject to taxation is incorrect because, in adopting an "alienability equals taxability"

analysis, it fails to give due consideration to the rule established by Supreme Court precedent that Congress must provide its "unmistakably clear intent" to allow state taxation of Indians or their property. Pet. App. 12. The majority stated that the error in the County's position was the result of its reading of *Yakima* as relying on section 5 of the GAA which rendered the allotted lands alienable upon patenting in fee, rather than on the Burke Act proviso in section 6 which, in the words of the court, was referred to repeatedly by this Court in *Yakima* "as the primary source of clear congressional intent to allow the ad valorem tax levied by Yakima County." Pet. App. 12-13. Thus, the court of appeals held that *Yakima* is properly read as having based its holding of taxability on the Burke Act proviso which, in the view of the court, permits taxation only of lands originally patented under the allotment provisions of the GAA after passage of the Burke Act. The court reasoned further that the pine land and homestead parcels, because they were not allotted under section 3 of the Nelson Act "in conformity with" the allotment provisions of the GAA, and the provisions of the Nelson Act authorizing their distribution did not include any mention of an intent to authorize their taxation, are not subject to ad valorem taxation. Pet. App. 22-23.

Second, the court of appeals stated that the County's interpretation of *Yakima* disregards the Court's conclusion in that case that "the § 6 Burke Act proviso authorized the ad valorem tax, but not the excise tax levied [on sales of reservation land] by Yakima County." Pet. App. 13. The court considered that distinction significant because, in its view, if the *Yakima* Court had considered alienability to

mandate taxability, it would have sustained the excise tax as well as the ad valorem tax. *Id.* Therefore, the court reasoned, since the *Yakima* Court determined that the Burke Act proviso authorized assessment of the ad valorem, but not the excise tax, the proviso must be a prerequisite to assessment of the ad valorem tax. *Id.* The majority then concluded that, since the proviso does not apply to the pine land and homestead parcels which were patented in fee pursuant to laws other than allotment under the Nelson Act "in conformity with" the allotment provisions of the GAA, those parcels must be exempt from ad valorem taxation. *Id.*

Finally, the court of appeals noted that the *Yakima* Court, after holding that the land in question was taxable under the GAA, remanded the case based on the Yakima Nation's assertion that it was "not clear whether the parcels at issue . . . were patented under the General Allotment Act, rather than under some other statutes in force prior to the Indian Reorganization Act." *Id.* at 14 n.7 (quoting *Yakima*, 502 U.S. at 270). The court concluded that the remand was an indication that the *Yakima* decision did not equate alienability with taxability, because if that were the case "it should not have mattered under which act the land was made alienable – the mere fact of alienability should have been enough to allow state taxation." *Id.* at 14.

In contrast to the majority decision, the dissent would have held that all of the land parcels in issue – those conveyed to non-Indians under the pine lands and Homestead Act provisions as well as those allotted to individual Indians "in conformity with" the allotment

provisions of the GAA – are subject to ad valorem taxation. *Id.* at 29. The dissent viewed the *Yakima* decision as grounded on the alienability provisions of section 5 of the GAA, with the Burke Act proviso in section 6 as merely "reaffirming" section 5's grant of authority by Congress to tax "all land allotted under the General Allotment Act." *Id.* at 27 n.15.

Following denial of its Petition for Rehearing with Suggestion for Rehearing En Banc, the County filed a petition for a writ of certiorari seeking review of the Eighth Circuit's ruling that the *Yakima* decision in favor of taxability is limited to land allotted under the Nelson Act in conformity with the allotment provisions of the GAA. The Court granted the petition on October 31, 1997. 118 S. Ct. 361.

SUMMARY OF ARGUMENT

This Court's decision in *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992), held that land originally patented in fee pursuant to the GAA and subsequently required in fee by the Yakima Indian Nation or its members is subject to county ad valorem taxation. 502 U.S. at 256, 270. The court of appeals erroneously held that the *Yakima* decision rested not on the alienability of the land but on the Burke Act amendment to section 6 of the GAA, which authorized the President, under certain circumstances, to issue fee patents prior to expiration of the trust period set out in section 5. The language in the proviso which the court found significant provided that upon such "premature" patenting "all restrictions as to

sale, encumbrance, or taxation of said land shall be removed." 34 Stat. 138. Pet. App. 17-18. The court of appeals decision is incorrect because it misread the *Yakima* opinion to have found the Burke Act proviso necessary to its decision upholding taxation of the land in question.

Contrary to the court of appeals' reading of *Yakima*, this Court made it clear in that case that the bases for its holding of taxability were (1) section 5 of the GAA which rendered the allotted land "alienable and encumberable" upon expiration of the twenty-five-year trust period; and (2) its previous decision in *Goudy v. Meath*, 203 U.S. 146 (1906), which based its holding of taxability on the alienability of land patented to an individual Indian under the GAA. *Yakima*, 502 U.S. at 263.

The court below, in determining that the express language of the Burke Act proviso was necessary to the holding of taxability in *Yakima*, emphasized the well-established rule that state taxation of Indians or their property is permissible only with Congress' unmistakably clear intent to authorize such taxation. Pet. App. 12. In emphasizing that rule, the court incorrectly stated that the *Yakima* decision "repeatedly pointed to the Burke Act proviso in § 6 as the primary source of clear congressional intent to allow the ad valorem tax levied by Yakima County." *Id.* at 12-13. To the contrary, as this Court stated in both *Yakima* and *Goudy*, the release of restrictions on alienability, absent an express exemption, is a sufficiently clear expression of Congress' consent to tax. 502 U.S. at 263; 203 U.S. at 149.

To summarize, the court of appeals erroneously held that *Yakima* stands for the proposition that county taxation of tribally owned land is limited to land allotted under the GAA after enactment of the Burke Act. Pet. App. 22-23. For this reason, the court incorrectly ruled in this case that the parcels patented under laws other than the GAA as adopted by the Nelson Act (the Homestead Act and as "pine lands" pursuant to the Nelson Act) are exempt from taxation by Cass County.

ARGUMENT

LAND PATENTED IN FEE BY THE FEDERAL GOVERNMENT AND SUBSEQUENTLY REACQUIRED IN FEE BY AN INDIAN TRIBE IS SUBJECT TO STATE AND LOCAL TAXATION IF IT REMAINS FREELY ALIENABLE, IRRESPECTIVE OF THE STATUTE OR TREATY UNDER WHICH IT WAS ORIGINALLY CONVEYED.

A. The *Yakima* Decision Upholding The Taxability Of Land Owned In Fee By The Yakima Nation Or Its Members Was Grounded On The Alienability Of The Land In Question.

The issue in this case is whether Congress, by patenting lands in fee and rendering them freely alienable, gave its implicit permission to tax those lands notwithstanding the absence of express statutory language to that effect. Cass County's position is that land patented in fee and made alienable by Congress is subject to taxation in the absence of a clear statement by Congress to the contrary. That is the rule applied in *Goudy v. Meath*, 203 U.S. 146 (1906), and *County of Yakima v. Yakima Indian Nation*, 502

U.S. 251 (1992), and it should be reaffirmed and applied in this case.

The decisions of this Court "reveal a consistent practice of declining to find that Congress has authorized state taxation" unless it has "made its intention to do so unmistakably clear." *Id.* at 258 (quoting from *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985)). This prerequisite to state taxation serves the purpose of preserving both the federal government's exclusive authority over relations with Indian tribes and the general exemption from state taxation of Indian tribes and individuals within their own territory. *See Montana v. Blackfeet Tribe*, 471 U.S. at 764. Cass County's position in this case – that Congress, by making land freely alienable, evinces an unmistakably clear intention to permit its taxation unless its exemption is clearly manifested – furthers the purpose of the rule, and is supported by long-standing Supreme Court case law.

In *Goudy v. Meath*, 203 U.S. 146 (1906), the issue was whether land which had become voluntarily alienable, then automatically became subject to taxation and involuntary alienation. *Id.* at 149, James Goudy was an individual member of the Puyallup Tribe located in the State of Washington. The federal government allotted land to Goudy in January 1886, under the authority of an 1854 treaty. *Id.* at 146-47. That treaty provided that land allotted thereunder would remain exempt from "levy, sale, or forfeiture" until such exemptions were removed by the state's legislature with the consent of Congress. *Id.* at 149. In 1889 the Washington State Legislature declared Goudy and similarly situated Indians to have "power to lease, encumber, grant, and alien the same . . . as any other

person may do. . . . " *Id.* at 147. In 1893 Congress approved the alienation of the allotted lands, after a period of ten years. *Id.*

After the ten-year period had passed, Goudy contended that his land, though now freely alienable by him, was "not subject to taxation or forced sale" until he actually conveyed the land to another person. *Id.* at 148-49. Goudy's contention was based on the fact that there was no express repeal of the exemption from "levy, sale, or forfeiture" contained in the treaty under which he took his allotment. *Id.* at 149. This Court acknowledged that Congress could "grant the power of voluntary sale while withholding the land from taxation or forced alienation," but that if Congress intended to do so that intention "should be clearly manifested." *Id.* at 149. The Court stated that the purpose of the restriction on alienation at that time (during the allotment period) was the "protection of the Indian from the cunning and rapacity of his white neighbors, and it would seem strange to withdraw this protection and permit the Indian to dispose of his lands as he pleases, while at the same time releasing it from taxation, – in other words, that the officers of a state enforcing its laws cannot be trusted to do justice, although each and every individual acting for himself may be so trusted." *Id.* at 149. Thus, the Court established the rule that freely alienable real property, absent a "clearly manifested" exemption, is subject to taxation. *Id.*

This Court reaffirmed *Goudy* in *Yakima*. The issue in *Yakima* was whether land patented in fee to individual Indians under the GAA, and subsequently reacquired in fee by the Yakima Nation or its members, was subject to taxation by the State of Washington. 502 U.S. at 253. The

Yakima Nation and its amicus United States argued that the termination of the allotment program with the enactment of the Indian Reorganization Act in 1934 operated to make the jurisdictional provisions of section 6 of the GAA (granting the State personal jurisdiction over the GAA allottees following expiration of the trust period) a "dead letter." *Id.* at 259-60. This meant, contended the Tribe and the United States, that lands owned by the Tribe or its members were not subject to taxation by the state. *Id.*

The Court, in reaffirming its holding in *Goudy* that voluntarily alienable land is subject to taxation and involuntary alienation unless explicitly exempt, described this argument focusing on section 6 of the GAA as "a misperception of the structure of the General Allotment Act." *Id.* at 263-64. The Court said with respect to the rule established by the *Goudy* decision:

> *Goudy* did not rest exclusively, or even primarily, on the § 6 grant of personal jurisdiction over allottees to sustain the land taxes at issue [in that case]. Instead, it was the *alienability of the allotted lands* – a consequence produced in those cases not by § 6 of the General Allotment Act, but by § 5 – that the Court found of central significance.
>
> . . .
>
> Thus, when § 5 rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes.

Id. at 263-64 (footnote omitted; emphasis by Court.) Consistent with this straightforward language in the majority

opinion, it is apparent that the dissent in *Yakima*, while disagreeing with the majority's holding on the property tax issue itself, considered that holding to have been grounded on the alienability of the land allotted under section 5 of the GAA. *Id.* at 272-73 (Blackmun, J., concurring in part and dissenting in part). Thus, there was no disagreement on the Court that the basis for its holding of taxability in *Yakima* was the alienability of the land in question.

This rule – that alienable land owned in fee by an Indian tribe or its members is subject to taxation unless explicitly exempt – has been in existence since the *Goudy* decision in 1906. With its reaffirmation in *Yakima*, the rule affords property tax assessors a consistent, fair, and ascertainable standard by which to classify real property, whether it is owned by an Indian tribe, a tribe member, or a non-Indian: if it is freely alienable it is subject to taxation unless exempt under a specific statutory or constitutional provision.

As longstanding legal precedent, the *Goudy/Yakima* rule deserves great deference under the principle of *stare decisis*. This is especially true because, in *Goudy* and *Yakima*, this Court interpreted Congressional enactments. As the Court has stated:

> Adherence to precedent is, in the usual case, a cardinal and guiding principle of adjudication, and "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."

California v. Federal Energy Regulatory Commission, 495 U.S. 490, 499 (1990), *reh. denied*, 497 U.S. 1040 (1990)(quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989)). Thus, if Congress had disagreed with the Court's decisions in *Goudy* and *Yakima*, it could have overruled either decision. The fact that the *Goudy/Yakima* principle has not been overruled by legislation is indicative of Congress' agreement with that principle.

B. In Holding That The Pine Lands And Homestead Parcels Are Exempt From Property Taxation, The Court Of Appeals Misread Both The *Yakima* And *Goudy* Decisions.

The *Yakima* decision fits squarely within the "alienability equals taxability" rule first established in *Goudy*. Nevertheless, the court of appeals declined to interpret *Yakima* in this manner and held that only fee land allotted both under the GAA (as incorporated into section 3 of the Nelson Act) *and* after enactment of the Burke Act is subject to taxation. Pet. App. 22-23. That holding is erroneous for a number of reasons: (1) validation of the property tax at issue in *Yakima* was not, as the court of appeals concluded, based on the express language of the Burke Act proviso; (2) invalidation of the excise tax at issue in *Yakima* does not imply, as stated by the court of appeals, that this Court would have upheld that tax if its decision on the property tax issue had been grounded on the alienability of the land; (3) the remand ordered by the Court in *Yakima* does not, as the court of appeals concluded, indicate that the *Yakima* decision was not based on the alienability of the land in question; (4) the absence

of explicit language in the Nelson Act authorizing taxation of the pine land and homestead parcels does not indicate a Congressional intent to exempt those parcels from taxation. In addition, the court of appeals decision, if left to stand, would produce anomalous results in the classification of property for tax purposes, as well as place an undue burden on property tax assessors in the administration of property tax laws.

1. The court of appeals erroneously concluded that this Court based its validation of the property tax in *Yakima* on the Burke Act amendment to section 6 of the GAA (the Burke Act proviso).

The primary basis for the court of appeals' interpretation of *Yakima* was its conclusion that: "The express language of the Burke Act proviso in § 6 of the GAA was needed to make sufficiently clear the intent of Congress to allow state ad valorem taxes." Pet. App. 21. Thus, the court erroneously concluded that *Yakima* must have relied on both section 5 and section 6 of the GAA in determining that the land at issue in that case was subject to taxation. *Id.* at 20-21.

To the contrary, in *Yakima* this Court discussed *Goudy* as the seminal case for the "alienability equals taxability" principle:

> As the *first basis* of its decision, *before reaching the "further" point of personal jurisdiction under § 6, id.* at 149, the *Goudy* Court said that, although it was certainly possible for Congress to "grant the power of voluntary sale, while withholding the land from taxation or forced alienation," such an

> intent would not be presumed *unless it was "clearly manifested."*

502 U.S. at 263 (emphasis added). Neither the *Yakima* Court nor the *Goudy* Court found such a clear manifestation of intent on the part of Congress. Those decisions, then, must have been based on the alienability of the lands in question, which in *Yakima* was the result of section 5 of the GAA. As this Court pointed out in *Yakima*, the *Goudy* Court reached its decision upholding taxation of the GAA allottee's land "without even mentioning the Burke Act proviso." *Id.* at 259.[8] In sum, *Yakima* reiterated the rule first set out in *Goudy*: freely alienable land owned in fee by a tribe or its members is subject to a state's tax laws in the absence of a clear statement by Congress to the contrary.

In contrast to the Eighth Circuit's misreading of the *Yakima* decision, the Ninth Circuit correctly read *Yakima* to stand for the proposition that freely alienable land patented in fee and reacquired in fee by an Indian tribe or its members, unless exempt under some provision of law, is subject to ad valorem taxation irrespective of the statute or treaty under which it was patented. *See Lummi Indian Tribe v. Whatcom County, Wash.*, 5 F.3d 1355, 1357 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2727 (1994). The *Lummi* Court also emphasized this Court's observation in

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[8] In acknowledging that *Goudy* did not refer to the Burke Act proviso in arriving at its decision, the court of appeals explained that fact away by stating that the proviso's language "was presumably available for the consideration of the Court." Pet. App. 21 n.11. That fact does not explain why the *Goudy* Court, if it considered the proviso essential to its holding of taxability, not once mentioned it in its opinion.

Yakima that it would not be presumed Congress intended to free land from restricted trust status while at the same time maintaining its exemption from taxation, which is a key element of trust status. *Id.* at 1358.[9]

The Eighth Circuit dissent in this case also read *Yakima* correctly as having based its determination of taxability on the land's alienability, with the Burke Act constituting "nothing more than additional support for its holding that alienability resulted in taxability." (Magill, J., concurring in part and dissenting in part). Pet. App. 27 n.15.

2. The fact that the *Yakima* decision struck down the excise tax imposed on sales of land does not support the court of appeals decision in this case.

The court of appeals also found support for its decision in the determination by this Court in *Yakima* that the excise tax levied by Yakima County on *sales* of land owned by the Tribe or its members is not authorized by the GAA. The majority concluded that:

> [i]f alienability always equals taxability, it should be the nature of the property right, not the nature of the tax, that matters. If that were the rule, the Court should have upheld both the ad

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[9] In a decision to the contrary, the Sixth Circuit held that the *Yakima* decision upholding the property tax was based on the explicit language of the Burke Act proviso. *See Saginaw Chippewa Indian Tribe v. State of Michigan*, 106 F.3d 130, 132-33 (6th Cir. 1997), Petition for Writ of Certiorari filed. *See* 66 USLW 3085 (June 30, 1997) (No. 97-14).

> valorem and the excise taxes levied by the County since the land was made alienable by the GAA.

Pet. App. 13.

That conclusion is incorrect. While the Court recognized that an excise tax on sales of land "would be fully in accord with *Goudy's* emphasis upon the consequences of alienability," the Court read the Burke Act proviso as arguably not permitting imposition of the excise tax. 502 U.S. at 268-69. In determining that it was not clear whether the jurisdictional language in the proviso permitted a tax on "sales" of land as distinguished from a tax on the land itself, *id.* at 268, the Court, invoking the principle that ambiguities in the law are to be resolved in favor of the Indians, stated:

> The short of the matter is that the General Allotment Act explicitly authorizes only "taxation of . . . land," not "taxation with respect to land," "taxation of transactions involving land," or "taxation based on the value of land." Because it is eminently reasonable to interpret that language as not including a tax upon the sale of real estate, our cases require us to apply that interpretation for the benefit of the Tribe. Accordingly, Yakima County's excise tax on sales of land cannot be sustained.

Id. at 268-69.

Thus, the *Yakima* Court drew a distinction between the property tax and the excise tax based on its conclusion that the GAA clearly authorized a tax on land, but not a tax on sales of land. For that reason, the invalidation of the excise tax does not even arguably imply, as

asserted by the court of appeals, that this Court would have upheld that tax if it had based its decision upholding the property tax on the alienability of the land in question.[10] To the contrary, the Court's ruling on the excise tax issue serves to highlight the fact that the Court, in reaffirming its holding in *Goudy*, found no ambiguity in section 5 of the GAA permitting taxation of fee-patented land after expiration of the restrictive trust period set out in that section.

3. The remand in *Yakima* does not support the court of appeals decision in this case.

The final reason expressed by the court of appeals for its determination that the Burke Act proviso is controlling on the property tax issue, is the fact that this Court ordered a remand in *Yakima* based on the contention by the Yakima Nation that it was not clear whether the lands in question had been patented under the GAA or under "some other statutes in force prior to the Indian Reorganization Act." Pet. App. 13-14 (citing 502 U.S. at 270). In ordering the remand this Court stated: "We leave for remand that factual point, and the prior legal question whether it makes any difference." *Yakima*, 502 U.S. at 270.

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[10] *See also Saginaw Chippewa Indian Tribe v. State of Michigan*, 106 F.3d 130, 133-34 (6th Cir. 1997), making the same interpretational error with respect to the invalidation of the excise tax in *Yakima*.

The court of appeals majority stated with respect to this remand that:

> [I]f alienability were equivalent to taxability, it is difficult to explain the terms of the remand in *Yakima*. That remand left open the question of whether land allotted under a different act might be taxed or not. If alienability equaled taxability it should not have mattered under which act the land was made alienable – the mere fact of alienability should have been enough to allow state taxation.

Pet. App. 13-14 (footnote omitted). Contrary to this conclusion, the *Yakima* Court, in recognizing, as explained in *Goudy*, that Congress could make freely alienable land exempt from taxation if its intention to do so was "clearly manifested," ordered the remand to determine whether any of the land parcels in question had been patented under such a statute or treaty, or, for that matter, under some provision of law restricting their alienability.[11] *See* 502 U.S. at 270. Thus, the remand in *Yakima* to resolve the question of whether any of the lands at issue may have been allotted under a statute or treaty expressly restricting their alienability or exempting them from taxation is not inconsistent with the principle that land made freely

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[11] The statutes cited by the *Yakima* Court in connection with its remand, 502 U.S. at 270, all involve, in some way, restrictions on alienability: 25 U.S.C. § 320 (1996) (acquisition of land by railway company applicable only to allotted land not yet fully alienable); 25 U.S.C. § 379 (1996) (sale of trust land by heirs of allottee); 25 U.S.C. § 404 (1996) (sale of trust land by allottee or heirs of allottee); 25 U.S.C. § 405 (1996) (sale of land "containing restrictions against alienation").

alienable by Congress is subject to taxation unless Congress has made a clear statement to the contrary.

For these reasons, the remand does not support the court of appeals' conclusion that the *Yakima* decision was based on the Burke Act proviso as the controlling statute. If anything, the remand supports the district court's decision and the County's position in this case that the alienability of the land, in the absence of an "unmistakably clear" exemption by Congress, was the basis for the Court's holding of taxability on the ad valorem tax issue.

4. The absence of explicit language in the Nelson Act authorizing taxation of the pine lands and homestead parcels does not indicate an intent on the part of Congress to exempt those parcels from taxation.

The court of appeals found support for its decision in the lack of any explicit authorization for ad valorem taxation in the pine land and homestead sections of the Nelson Act. Pet. App. 22. The absence of such authorization, however, is understandable. The pine land and homestead parcels were intended to be sold to non-Indian purchasers rather than allotted to individual members of the Tribe, and for that reason Congress naturally presumed that those lands would be subject to state taxation. With that presumption in mind, there was no need for Congress to give its express permission to impose a tax on them.

5. The court of appeals decision in this case would produce both serious administrative problems for property tax assessors and inequitable results in the classification for tax purposes of Indian-owned lands.

It is apparent that the *Yakima* decision, as interpreted by the *Lummi* court and both the dissent and the district court in this case, establishes an ascertainable and fair standard for the administration of property tax laws: fee-owned land which was patented in fee is subject to taxation unless exempt under some provision of statutory or constitutional law. *See Yakima*, 502 U.S. at 265 (stating that: "parcel-by-parcel determinations" required to be made by the tax assessor "on the reservation do not differ significantly from those he must make off the reservation, to take account of immunities or exemptions enjoyed, for example, by federally owned, state-owned, and church-owned lands").

In contrast, the Eighth Circuit decision, if allowed to stand, would produce anomalous and unfair results. Rather than classifying fee-patented land owned by an Indian tribe or its members in accordance with applicable statutory and constitutional provisions, the Eighth Circuit decision would result in the classification of such land as taxable or exempt based on when, under what statute or treaty, and to whom, it was patented in fee. In the case of Cass County, for example, lands originally sold to non-Indians pursuant to the Nelson Act as alienable and taxable pine lands or homesteads, upon reacquisition in fee by the Tribe, would enjoy the same tax-exempt status as do lands held in trust for the Tribe by the United States

government. Conversely, lands patented in fee to individual members of the Tribe pursuant to the Nelson Act (in conformity with the allotment provisions of the GAA) after passage of the Burke Act, upon reacquisition in fee by the Tribe, would be subject to taxation.

In addition, the Eighth Circuit decision in this case, if allowed to stand, would require a property tax assessor in Minnesota not only to determine whether land owned by a Tribe or its members had been patented under section 3 (potentially taxable) or sections 4, 5 and 6 (exempt) of the Nelson Act, but, if it had been patented under section 3, to determine whether the patent was granted before or after passage of the Burke Act in 1906. Such a requirement with respect to each parcel of land would produce unduly burdensome administrative problems for state and local property tax officials. This Court could not have intended the burdensome and anomalous consequences which surely will flow from this court of appeals decision if it is allowed to stand.

CONCLUSION

For the foregoing reasons, the decision of the Eighth Circuit Court of appeals should be reversed.

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